Supreme Court, U. S.
FILED
AUG 13 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL COMPANY,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

—and—

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Motion for Leave to File a Brief, *Amicus Curiae*

Now comes the National Association for the Advancement of Colored People (Special Contribution Fund, Inc.) and respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

The Interest of the *Amicus*

The National Association for the Advancement of Colored People, organized in 1909, is the oldest and largest civil rights organization in the country. It has a membership of 470,000 persons in 1,700 branches located throughout the 50 states. The principal objective of the organization is to ensure the political, educational, social and economic equality of Black persons. It endeavors to remove all barriers of racial discrimination through the democratic process. From the date of its founding, one of its major concerns has been the attainment of equal economic opportunity for the nation's Black minority.

A substantial portion of the membership of the National Association for the Advancement of Colored People is comprised of working men and women whose lives are directly affected by the national will—or lack of it—to eradicate the vestiges of an economic caste system based on race. In addition, the efforts of the organization in this regard have affected and will continue to affect hundreds of thousands of black, as well as other minority, workers.

This case raises fundamental questions regarding the viability of Congressional enactments aimed at ending racial discrimination in employment. The decision of the National Labor Relations Board, if allowed to stand, will seriously impair the efforts of the National Association for the Advancement of Colored People to assist in effectuating the broad Congressional mandate that racial discrimination in employment must cease, as expressed in Title VII of the Civil Rights Act of 1964 and related statutes.

The written consent of the attorneys for both Petitioners, and for the Respondent, has been obtained, and is on file with this Court.

The National Association for the Advancement of Colored People is the largest national civil rights organization in the country, and as such, is vitally concerned with the employment rights and opportunities of Black Americans. The specific interests of the NAACP in this case are the protection of individuals who draw public attention to discriminatory employment practices through leafleting, pamphleteering and like means; and the full effectuation of the policies expressed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. These interests are set forth more fully in the body of the brief accompanying this motion.

Because the NAACP is national in scope, it is able to address the issues raised by these petitions in the broad context of the unified national purpose to eradicate racial discrimination in employment.

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ARGUMENT

I.

Introduction

In *Miller* v. *International Paper Company*, 408 F.2d 283, 294 (C.A. 5), Judge Gewin observed that:

> . . . on the surface the present case concerns only the meaning of certain statutory provisions. But beneath the legal facade a faint hope is discernable rising like a distant star over a swamp of uncertainty and perhaps of despair. Those who love their work may sometimes forget that a successful human community requires the performance of many vapid and colorless tasks. Even the most tedious physical labor is endurable and in a sense enjoyable, however, when the laborer knows that his work will be appreciated and his progress rewarded. "Work without hope," said Coleridge, "draws nectar in a sieve, And hope without an object cannot live." The ethic which permeates the American dream is that a person may advance as far as his talents and his merit will carry him. And it is unthinkable that a citizen of this great country should be relegated to unremitting toil with never a gleam of light in the midnight of it all. [Footnotes omitted.]

That observation is equally applicable here. Although cast by Petitioners as involving conflicting statutory provisions, this case involves racial discrimination in employment.

The facts[1] which give rise to this litigation are that Tom Hawkins and Jim Hollins, two black employees of Petitioner Emporium Capwell Company, were discharged for

[1] Amicus adopts the statement of facts set forth in the Brief of Respondent.

protesting the racially discriminatory practices of their employer (Pet. App., pp. 88-89; A. 17-18, 51).[2] Following their discharge, Respondent Western Addition Community Organization filed unfair labor practice charges with the National Labor Relations Board, alleging that the discharges violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151, et seq.

The Board ruled, with two members dissenting, that the discharges were not violations of Section 8(a)(1), since the employees were members of a labor organization which is the exclusive bargaining representative within the meaning of Section 9 of the Act, and the protests amounted to an attempt by the employees to bypass the Union and bargain directly with the employer (Pet. App., p. 104). Therefore, the Board reasoned, Hawkins and Hollins were not entitled to the protection of Section 7 of the Act (Pet. App., p. 104-105).

On petition for review, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that, since Hawkins and Hollins were attempting to exercise rights guaranteed them by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, an accommodation of § 704(a) of Title VII with § 7 of the N.L.R.A. entitled the employees to Section 7 protection (Pet. App., p. 20), unless the exclusive bargaining agent was acting to resolve the complaints of discrimination to the fullest extent possible by the most expedient and efficacious means (Pet. App., p. 28). The case was remanded to the Board for that determination to be made.

In this brief, Amicus will address two questions with which it is particularly concerned: Whether the Board

[2] "Pet. App." refers to the appendix to the petition for certiorari in No. 73-696. "A." refers to the separate appendix filed in this Court.

justifiably concluded that the activities of Hawkins and Hollins amounted to an attempt to bargain separately with respect to working conditions? and, assuming that it was justified in so finding, whether there exist sound reasons for denying to the discharged employees the protection of § 704(a) of Title VII?

II.

The Board's Conclusion That Hawkins and Hollins Were Attempting to Bargain Separately Has No Basis In This Record, and Reflects a Fundamental Misunderstanding of the Nature of Racial Discrimination.

The trial examiner concluded that Hawkins and Hollins were not entitled to the protection of § 7 of the National Labor Relations Act "because their activities amounted to, in short, no less than a demand that the Respondent bargain with the picketing employees for the entire group of minority employees on terms and conditions of employment" (R. 270, emphasis added).[3] The trial examiner reasoned that "separate bargaining" would undermine the right of employees to bargain through representatives of their own choosing, and would "place on the employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement." 485 F.2d at 924.

Implicit in that conclusion is a finding that Hawkins and Hollins were attempting to organize a new, separate labor organization to seek working conditions *different* from those enjoyed by the majority of the bargaining unit. Such a finding is unwarranted on this record, and is contradicted by the contextual inferences which must be drawn from these facts.

[3] This form of citation refers to the original record.

A. *The Concerted Activity Was Directed at Correcting Inequality of Treatment and Not to Creating a Separate Bargaining Unit*

The only record support for the trial examiner's conclusion that the dissident employees were attempting to bargain separately are Hollins' and Hawkins' statements that their purpose was "to try to talk to the top management to get better conditions for the Emporium" (A. p. 11; pp. 21, 28). The trial examiner obviously took these statements to mean that the employees wanted to talk to the president for the purpose of bargaining; that is, to negotiate a contract separate and different from the existing contract between the Emporium and the Union. In drawing such an inference from those isolated statements, however, the examiner necessarily ignored a substantial portion of the evidence which plainly indicated what the real purpose of the concerted activity was.[4]

When employees such as Tom Hawkins and Joe Hollins seek redress from racial discrimination, they do so not to gain any unearned privilege, nor do they seek favors they are not entitled to. They seek only equal treatment. The very word "discrimination" describes differing treatment. The record in this case indicates rather clearly that all Hawkins and Hollins sought was treatment on a basis similar to that which had been accorded to the white majority. Hollins, for example, explained that the reason for the leafleting was that minority people were not being treated fairly (A. p. 48). He based his judgment on his own experience—his individual complaint was that he was doing supervisor's work and not getting paid for it (A. p. 10)—and on the experience of several other employees (A.

[4] The trial examiner in any event was predisposed to ignore evidence regarding the purpose of the concerted activity, as indicated by his ruling that, "I have ruled out state of mind for twenty five years and I will rule it out now" (R. p. 34).

pp. 53-54). Hawkins explained that he took the action he did because black, brown, yellow and red people weren't being treated fairly (R. 35). Hawkins said that, "everybody had a basic grievance or basic complaint about how the Emporium was treating black, brown and yellow people and we wanted to get to the core of them and the purpose of the meeting, of talking to the president, was to try to get better conditions and this was the main purpose of it" (A. p. 21).

By seeking an audience with the president, the employees were doing no more than indicating that the normal channels of communication were not working. They had encountered frustration and delay at the hands of the Union (A. pp. 26, 81), and had attempted, unsuccessfully, to resolve the matter through the Company's personnel manager (A. pp. 64-65). All these employees wanted to do was to "get to the core" of the Emporium's discriminatory treatment. Nothing in that design connotes separate bargaining for different working conditions.

Perhaps in another context, the desire of a group of employees to speak directly with the president of a Company without going through the normal Union channels could be considered an attempt to bargain separately. But where that desire is the result of a quest for basic dignity, accorded by the Company as a matter of course to the majority of union members but granted sparingly, grudgingly and at random to the bargaining units' darker-skinned members, that conclusion cannot be drawn. The trial examiner's reluctance to consider, at the hearing, that racial discrimination provided the motivation for the employees' acts (R. pp. 34-35), and his complete disregard of motivation in making his findings and conclusions, cannot be justified in the absence of countervailing evidence from the Company that Hawkins and Hollins were attempting to

do something more or different from gaining equality of treatment. There was no such evidence. The trial examiner's conclusion, and the Board's adoption of it, demonstrate at best a lack of awareness of the problems encountered by racial minorities in seeking to accommodate the promise of equality of Title VII with existing discriminatory labor-management practices. That lack of awareness resulted here in conclusions that are simply unsupported by the record before this Court.

B. *The Concerted Activity Was Precipitated By the Failure of the Union to Process Grievances on a Group Basis*

"Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class." *Hall* v. *Werthan Bag Corp.*, 251 F.Supp. 184, 186 (M.D. Tenn.). This important principle, announced early in the history of Title VII litigation, is recognized as a fact of life by minority working people throughout this country. Jim Hollins and Tom Hawkins knew that in 1968 when they sought to rectify the discriminatory policies of their employers: they realized that one cannot discriminate against an individual because he is black without likewise discriminating against all other black individuals. As Mr. Hawkins noted in his testimony before the trial examiner, ". . . *everybody* had a basic grievance or a basic complaint about how the Emporium was treating black, brown and yellow people . . ." (A. p. 21, emphasis added).

Thus it was for good reason that the complaining employees insisted that the Union process their grievances on a group rather than an individual basis. According to Tom Hawkins, if the grievances were processed on an individual basis, the Company would attempt to satisfy only a few of the grievances, and the broader problems of class-based discrimination would be ignored (A. p. 27).

Hawkins' reaction to the suggested Union approach is borne out of the experience of black workers in pressing for resolution of employment discrimination. Because human conduct toward a class or race of people is much less ambiguous than human conduct toward individuals, class discrimination is much less difficult to observe than individual discrimination founded on class-based animus. Cf. *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (C.A. 5); *Bolton* v. *Murray Envelope Company*, 493 F.2d 191 (C.A. 5); *Huff* v. *N.D. Cass Co. of Alabama*, 485 F.2d 710 (C.A. 5).

Hawkins and Hollins clearly recognized the inevitability of failure of the Union's efforts. That recognition, coupled with the design of their activity: to secure equal—not preferred—treatment, negates any inference that the purpose of their activity was to force the Company into a separate contract. The trial examiner's conclusion that separate bargaining was the purpose for the employees' leafleting is completely unjustified.

The National Labor Relations Board suggests that the employees' recognition of the futility of processing individual grievances, and the Union's insistence on proceeding in that manner, amounts in this case to a "dispute over tactics", and that such a dispute undermines the principle of majority rule embodied in § 9 of the N.L.R.A. (Board, p. 22).[5] But those differences are not tactical, they are substantive. The Union's failure to treat claims of racial discrimination as a class problem is, in effect, a failure to treat them at all. Quite properly, the Union recognized that discrimination existed, and quite properly it attempted to resolve it. But what counts in treating racial discrimination in employment is not whether an employer—or union

[5] This form of citation refers to the Brief of Petitioner National Labor Relations Board.

—recognizes and moves on the problem, but whether the problem is solved. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432; *Rowe* v. *General Motors*, 457 F.2d 348, 355 (C.A. 5); *Johnson* v. *Goodyear Tire and Rubber Co.*, 491 F.2d 1364, 1376-1377 (C.A. 5); *Baxter* v. *Savannah Sugar Refining Company*, 495 F.2d 437, 442-443 (C.A. 5).

The Court of Appeals, in reversing the Board, held that even though the Union may have appeared to be acting in good faith, unless the method chosen for resolution of the charges was the most expedient available to it, Hawkins and Hollins were entitled to § 7 protection even though they had sought to circumvent the bargaining unit. That holding clearly suggests that the court below recognized the inherent defect in the Union's approach to its minority members' complaints. The effect of the Board's order, then, is to penalize Hawkins and Hollins for recognizing the inefficacy of treating racial discrimination claims as individual problems. Such a result is clearly contrary to the Congressional mandate expressed in Title VII that employment discrimination must end.

III.

There Exist No Sound Reasons for Denying the Protection of Title VII in the Circumstances of This Case.

Section 704(a) of the Civil Rights Act of 1964, as amended by P.L. 92-261, March 24, 1972, 42 U.S.C. § 2000e-3(a), provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice, made an unlawful employment practice by this Title, or because he has made a charge,

> testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title.

This Court has said that § 704(a) forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 796 (emphasis added).

It is difficult to conceive a factual situation more clearly indicating a protest of allegedly racially discriminatory employment practices than the facts presented by this case. Even assuming, *arguendo,* that record evidence existed to support the trial examiner's conclusion that the object of the concerted action in this case was to force the employer to bargain separately with the dissenting employees, it is nonetheless clear that the subject matter of that separate bargaining was intended to encompass no more than the issue of racial discrimination. Thus, the activities of Hawkins and Hollins fall plainly within the scope of § 704(a)'s protection.

Neither the trial examiner nor the Board addressed the issue of Title VII protected activity. Instead, the Board's decision was limited to whether or not the concerted action was protected by § 7 of the National Labor Relations Act. Petitioners, particularly the National Labor Relations Board, advance a number of reasons in support of this narrow focus. Most of those reasons are based on pure speculation, and none of them withstand scrutiny.

The National Labor Relations Board argues that "separate bargaining" of the kind sanctioned here by the Court of Appeals derogates from the authority of the exclusive bargaining representative (Board, p. 21). That is so, the argument runs, because of potential interference with the majority representatives authority by virtue of possible

disagreements over allegations of discrimination (Board, p. 22). To be sure, there will be disagreements between bargaining representatives and their minority members over allegations of discrimination. But allegations of discrimination are precisely what § 704(a) protects. *McDonnell Douglas Corp.* v. *Green, supra* at 796. Thus, whether or not a union agrees, protests of alleged discrimination are protected by § 704(a). Any potential interference with the majority representative's authority must therefore yield to this statutorily conferred right.

Separate bargaining would also require the employer to run a serious risk of committing an unfair labor practice, according to the Board (Board, p. 21). There is nothing to support such speculation. Amicus knows of no instance where an employer has been found guilty of an unfair labor practice for having dealt with and eradicated employment discrimination. Cf. *Savannah Printing Specialties* v. *Union Camp,* 350 F.Supp. 632 (S.D. Ga.). To the contrary, the most serious risk an employer faces in such a situation is that he will not act fast enough to eradicate employment discrimination. Cf. *Rowe* v. *General Motors Corp.,* 457 F.2d 348 (C.A. 5). An employer who allows institutional practices—including bargained-for seniority systems—to stand in the way of prompt action to remove discriminatory barriers, faces substantially more hazardous risks in resultant Title VII action than it does from an unfair labor practice charge. Cf. *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F.2d 980; *United States* v. *Georgia Power Company,* 474 F.2d 906 (C.A. 5); *Moody* v. *Albemarle Paper Company,* 474 F.2d 134 (C.A. 5); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (C.A. 5).

The Board's argument that a "special concession or benefit granted" to an individual will create industrial strife

(Board, p. 23) is specious in the context of this case. In the first place, the argument is founded on the erroneous assumption that Hawkins and Hollins were seeking "special concessions or benefits". There is absolutely nothing in the record before this Court to indicate that these employees were seeking anything other than equal treatment. We do agree with the Board that concessions made to minority employees would "disturb preexisting arrangements" and, "in many cases would adversely affect the interests of at least some of the employees not represented by the dissidents" (Board, p. 23). But courts have properly not hesitated to "disturb preexisting arrangements" when such a disturbance was necessary to meet the requirements of Title VII. *Savannah Printing Specialties Union* v. *Union Camp Corp., supra.* Further, the fact that the expectations of the majority might be frustrated is no bar to changing the established order so as to comply with the law. See *Acuff* v. *United Papermakers & Paperworkers, AFL-CIO,* 404 F.2d 169 (C.A. 5).

The Board also argues that "separate bargaining", if allowed here, would not necessarily stop here, and the principle of majority rule would therefore be substantially eroded (Board, p. 24). That argument is completely fallacious, since it presumes that, because the Court of Appeals approved separate bargaining over racial discrimination, it also must necessarily approve separate bargaining over other, unspecified issues. Nothing in the opinion below supports such speculation. The opinion, to the contrary, is careful to point out that the right to non-discriminatory treatment differs significantly from other "conditions of employment". 485 F.2d at 917. Thus, even though "separate bargaining" might not *logically* stop at racial lines (Board, p. 25), it will *legally* stop there. To suggest otherwise ignores the lower court's careful limitation of the rights involved in this case.

The Board suggests that, because Hawkins and Hollins had available to them contractual and statutory remedies other than the concerted activity at issue here, the protection of § 704(a) should be limited to those instances where an employee has "made a charge, testified, assisted, or participated in . . . an investigation, proceeding or hearing," thus reading out of the statute protection for those who "oppose[] any practice made an unlawful employment practice by this title . . ." (Board, p. 26-28). This approach to statutory construction is, to say the least, novel. The Board cites no authority to support it. By the same analogy, Petitioners might argue that, since internal Union remedies were available, protection of those who file charges or bring suit might also be withdrawn, since the bringing of a lawsuit against one's own union must also surely "decreas[e] union prestige and prevent[] the bargaining unit from maintaining a united front" (Board, p. 21). Petitioner's suggestion is therefore without either legal or logical support.

In its most serious mischaracterization, the Board argues that Hawkins' and Hollins' concerted activity will frustrate the purpose of Title VII, since it frustrates the good faith efforts of the bargaining unit to remedy employment discrimination (Board, p. 37). Although good faith efforts by the bargaining representative to remedy employment discrimination are commendable, and are useful in achieving equality of employment opportunity, they do not in themselves reflect the purpose of Title VII. The purpose of the Act is, as courts have repeatedly noted in the face of "good faith" defenses to Title VII actions, to end employment discrimination. *Rowe* v. *General Motors Corp., supra.*

Title VII brought with it radical changes in the way in which employers and bargaining representatives do busi-

ness. Seniority systems, employment selection devices, nepotism agreements, weightlifting requirements and a host of other employment practices have yielded to the statute's demand for equality of treatment. Petitioners have suggested no valid reason why the principle of majoritarian rule embodied in Section 9 of the N.L.R.A. should not, *only to the extent it must,* also yield to that demand. The principle has in the past yielded to this Court's insistance that bargaining units fairly represent all its employees. *Steele* v. *Louisville and Nashville Railroad Co.,* 323 U.S. 192. Petitioners cite nothing to indicate that Title VII rights are any less important than the duty of fair representation.

Certainly the Board's functions are made more complicated by Title VII's existence, but the statute is there, and its provisions as relate to the facts of this case are plain. The Board must not ignore them, as it did in reaching its decision in this case. It would be anamolous indeed if the Board, which is itself required to heed § 717 of Title VII when it makes internal employment decisions, were allowed to ignore the statute when it reviews the employment decisions of private employers and bargaining representatives. The principle of majority rule has not been undercut by the principle of fair representation; neither will it be undercut by reference to § 704(a).

CONCLUSION

For the above and foregoing reasons, and for the reasons set forth in the brief of Respondents, the decision of the court below should be affirmed.

Respectfully submitted

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Certificate of Service

This is to certify that I have this date served a copy of the above and foregoing Brief of Amicus Curiae National Association for the Advancement of Colored People on the following counsel of record, by depositing same in the United States Mail with adequate postage affixed:

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